IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 9240

B. C. SCHRAM, as Receiver of the First National Bank-Detroit, a National Banking Association,
Appellant,

vs.

BERTHA H. ROBERTSON,
Appellee

REPLY BRIEF ON BEHALF OF APPELLANT, B. C. SCHRAM, AS RECEIVER OF FIRST NATIONAL BANK-DETROIT

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SUBJECT INDEX

CASES AND OTHER AUTHORITIES CITED

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EXPRESS WRITTEN CONTRACT OBLIGATION OF APPELLEE

This Court has previously held, in three cases, that Article IX-A of the Articles of Association of Detroit Bankers Company constitutes an *express written contract,* separate from and independent of any statutory liability, to pay the First National Bank-Detroit stock assessment; that this contract, printed on each Detroit Bankers Company stock certificate, was and is binding on the Detroit Bankers Company shareholders, of which

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NOTE: Emphasis supplied by italics and bold face ours.

appellee is one; and that this *independent contractual obligation* is governed by a different statute of limitations than that applicable to a "liability created by law."

Schram v. Smith (1938), 97 Fed. (2d) 662;
Schram v. Ledya (1938), 97 Fed. (2d) 665;
Schram v. Poole (1938), 97 Fed. (2d) 566.

Appellee contends, in her brief, that these decisions are not in point here. *This statement of appellee is directly contrary to the facts.* As pointed out in appellant's opening brief, the same issue on pleadings the same in substance was before this Court in the cases above cited, particularly the *Smith* and *Ledya* cases, as is before this Court in the case at bar; *and those decisions are controlling in the instant case.*

In here pressing his assessment claim on the independent contract obligation voluntarily assumed by appellee, appellant is not changing his position whatsoever. Beginning with the parent case of *Barbour v. Thomas* (D. C. Mich. 1934), 7 Fed. Supp. 271; (C. C. A. 6, 1936), 86 Fed. (2d) 510; cert. den. (1937), 300 U. S. 670, 81 L. Ed. 877, appellant has successfully proceeded on these *two distinct and separate* causes of action against holders of Detroit Bankers Company stock for the collection of the First National Bank-Detroit stock assessment. The discussion in appellant's opening brief of *Barbour v. Thomas,* and other authorities supporting the decisions of this Court in the *Smith, Ledya* and *Poole* cases, bears this out, and no reargument of these cases is called for here.

Further, two United States District Courts, in cases involving this First National Bank-Detroit assessment,

have recently *again* held that such an *express written contract* exists, and have given an effect to it beyond the rights that exist in appellant on any purely statutory grounds of assessment liability.

Schram v. Hail (U. S. D. C., Eastern Dist. of Mich., 1939), Civil Action No. 95.

Schram v. MacPherson (U. S. D. C., Southern Dist. of Fla., 1939), Case No. 859-J, in Equity.

Excerpts from the opinions, as yet unreported, of these courts are set forth in the appendix to this brief.

The only new case introduced by appellee to overcome the effect of the *Smith* and *Ledya* decisions of this Court is *Schram v. Cotton* (1939), 257 App. Div. 283, 12 N. Y. S. (2d) 918.

The *Cotton* case has now been before the New York Court of Appeals on appeal from the decision of the Appellate Division of the New York Supreme Court cited by appellee, the opinion of the New York Court of Appeals being reported in 281 N. Y. 499, 24 N. E. (2d) 305. It is noteworthy that the reasoning of the Appellate Division is not followed by the New York Court of Appeals. It was so manifestly unsound that it was not there urged by counsel for Cotton. It is obvious that "in the same manner and to the same extent" cannot be tortured into meaning within the same time.

If the phrase "in the same manner and to the same extent" is, by such a strained construction, to be construed to treat of the limitations element, equal significance as regards this element must be given the words of Article IX-A immediately following: "as statutory

liability may now or hereafter be enforceable against stockholders of banks or trust companies under the laws *under which said banks or trust companies are organized or operate.''* The only state laws so involved were those of Michigan, and Michigan provides a *six-year* period of limitations for actions on both the contract and the statutory phases of the assessment liability. (Appellant's opening brief, pp. 68-70.)

Of course, in the same manner means by the bank receiver, and to the same extent means as regards amount. It relates to the *substantive* and not the procedural aspects of the statutory liability. These substantive provisions were thus incorporated by reference for the sake of brevity; and the levy of the assessment by the Comptroller was merely a condition precedent to liability under the express written contract, which liability existed whether or not the holding company shareholders were subject to the statutory liability as the true and beneficial owners of the bank stock.

As the New York Court of Appeals points out, the *Cotton* case construes a New York statute of limitations which differs in phraseology from the California and Arizona statutes considered by this Court. Because of the peculiar phraseology of the New York statute, the Court of Appeals said:

> ''The problem concerns less the construction of the contract of the defendant than the *construction of the New York statute,* and in the solution of that problem *the decisions of the courts of Michigan and of the Federal Court furnished little help.''*

The Court of Appeals of New York did *not* hold that there was no independent express written contract

liability. On the contrary, it held there was such superadded contract liability embodied in Article IX-A of the Articles of Association of Detroit Bankers Company, the text of which was printed in clear type on the back of each Detroit Bankers Company stock certificate and referred to on the front of each certificate. The court spoke of the statutory liability *"which has been expressly assumed by the stockholders of the dominant corporation";* but held that it, as well as the statutory liability, came within the purview of the New York statute (Civil Practice Act, Sec. 49, subdiv. 4) reading:

> "An action against a director or stockholder of a moneyed corporation *or banking association,* to recover a penalty or forfeiture imposed, or to enforce a liability created *by the common law or by statute.* * * *"

The difference between the New York statute and those of California and Arizona construed by this Court was pointed out and urged at length by counsel for Cotton, who, in their brief before the New York Court of Appeals, said:

> "The *difference in phraseology* between the New York statute of limitations applicable to bank stock assessment and similar statutes in other states *is significant."*

In arriving at this summation, counsel stressed the weight to be given the fact that this particular New York statute, following the general one, referred in specific terms to bank stockholders' liabilities and included such liabilities *created by the common law* as well as by statute. The liability of a party under a contract was urged to be a liability recognized and en-

forceable under general common law principles in New York, hence that the statute was designed to cover *all* actions of *any* origin against a stockholder of a banking association related to his status as a stockholder.

In upholding such a distinction, the New York Court of Appeals said that its problem concerned the *construction of the New York statute;* that little help was furnished by the Federal and Michigan Court decisions. For this reason it declined to follow them.

Appellee, in her attempt to evade payment of her First National Bank-Detroit assessment obligation, also professes to find in *Simons v. Groesbeck* (the same case as *Backus v. Connolly)*[1] (1934), 268 Mich. 495, 256 N. W. 496, a defense to action by appellant on the express written contract cause of action arising out of Article IX-A.

As pointed out in appellant's opening brief, it was held in *Backus v. Connolly, supra,* that this *Article IX-A imposes upon the Detroit Bankers Company shareholders a contractual obligation distinct from their statutory liability* to pay the First National Bank-Detroit

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NOTE: [1]*Simons v. Groesbeck* involved the relation between the Guardian Detroit Union Group, Inc., to the Guardian National Bank of Commerce of Detroit, which closed at the same time as First National Bank-Detroit. The Guardian Detroit Union Group, Inc., was the holding company which held the stock of the Guardian National Bank of Commerce, as Detroit Bankers Company did the stock of First National Bank-Detroit, and the Guardian Detroit Union Group, Inc., stockholders were liable for the Guardian Bank assessment on the same sort of contract obligation assumed by Detroit Bankers Company stockholders. *Backus v. Connolly* was the companion case involving the Detroit Bankers Company-First National Bank-Detroit relationship. Both cases were tried together in the lower court, heard together on appeal, and one opinion written by the Supreme Court of Michigan to cover both cases.

stock assessment. Since the Receiver of First National Bank-Detroit was not made and did not become a party in *Backus v. Connolly,* no issue was there presented as to his, the bank receiver's, right to collect directly on this contract. However, both the holding company receiver and the bank receiver were parties defendant in *Barbour v. Thomas, supra,* and the issue was there presented, and it was there decided that *the bank receiver was entitled to enforce the contract obligation of Detroit Bankers Company shareholders embodied in Article IX-A,* as well as to enforce the statutory liability of these parties. *On the issue that was before it in Backus v. Connolly, that is, the effect of Article IX-A as a separate and distinct contract obligation, the Supreme Court of Michigan, is in accord with the Federal Courts in Barbour v. Thomas, supra.* The cases are not in conflict.

Judge Hayes, in his opinion in *Barbour v. Thomas,* (D. C. Mich., 1934), 7 Fed. Supp. 271, 278-9, spent some time in meeting and disposing of the objections interposed by the Detroit Bankers Company shareholders to direct recovery by the bank receiver from them *on their separate and independent contract obligation.* In holding them bound on this contract to the bank receiver, Judge Hayes was sustained by the Sixth Circuit Court of Appeals (86 Fed. (2d) 510), as pointed out in appellant's opening brief. It might be well to point out further that *Barbour v. Thomas* was tried in the District Court, and the decision of Judge Hayes rendered prior to the trial of the case of *Backus v. Connolly.*

No cogent reason has been advanced by appellee, nor exists, for any reconsideration or reversal of this

Court's sound position on this general fundamental issue as definitely established in the *Smith, Leyda* and *Poole* cases; *and these cases are determinative of this same issue here again presented to this Court.*

Appellee's argument that Article IX-A has the effect of overriding an act of Congress has no basis whatsoever, either in fact or in law. The contract obligation assumed by the holders of Detroit Bankers Company stock is a *superadded* obligation. It subtracts nothing from the statutory assessment liability; it does not affect the provisions of the National Bank Act in any way whatsoever. *The two separate liabilities exist side by side, and are in no manner conflicting.*

The history of the incorporation of this superadded contract obligation into the Articles of Association of Detroit Bankers Company is outlined, briefly, in appellant's opening brief (pages 18-20). It is also referred to in Judge Hayes' opinion in *Barbour v. Thomas* (D. C. Mich. 1934), 7 Fed. Supp. 271, 273. It is apparent from this history that the idea, effectually carried out, was not to restrict the operation of the National Bank Act, but to make clear and certain that any bank assessment would be paid by those who were, in fact, to enjoy the benefit derived from the bank stocks, irrespective of style in which the ownership thereof would be formally registered on the stock records of First National Bank-Detroit, and the other units of Detroit Bankers Company.

Appellee speaks of the assessment being "now spread over a field of shareholders in a manner that has the operative effect of reducing the statutory liability of the original First National Bank-Detroit shareholders," etc. This was not the product or result of the contract.

The transfer of the bank stocks for holding company shares in 1928-1929 gave rise to a new group of real, true and beneficial owners of First National Bank-Detroit stock. The identity of the parties and the amount payable by each is the same under the contract as under the statute, although *the source or ground for the liabilities are separate and distinct, as are appellant's causes of action on the separate and distinct grounds.*

Barbour v. Thomas (D. C. Mich. 1934), 7 Fed. Supp. 271; (C. C. A. 6, 1936), 86 Fed. (2d) 510; cert. den. (1937), 300 U. S. 670, 81 L. Ed. 877;

Ullrich v. Thomas (C. C. A. 6, 1936), 86 Fed. (2d) 678; cert. den. (1937), 301 U. S. 692, 81 L. Ed. 1348.

The contract not being in conflict with the National Bank Act, nor purporting to affect the provisions of the National Bank Act in any way whatsoever, appellee's argument on this point is entirely irrelevant. Of course, the levy of the assessment by the Comptroller of the Currency of the United States was essential to make operative and enforceable the contractual obligation embodied in Article IX-A. However, it was essential as regards the contractual obligation only because of its being the condition precedent to the bringing into force and making operative and enforceable the contract obligation. As pointed out and discussed on pages 42 and 43 of appellant's opening brief, the contract incorporated by reference, for the sake of brevity, the *substantive* aspects of the statute. This was all it did do. The basis for the two liabilities are absolutely distinct. The statutory liability rests upon the provision of the law, the contract obligation does not. *The contract liability rests squarely*

upon the promise or assumption of the obligation by the shareholders of the Detroit Bankers Company, including appellee.

That there was adequate consideration for this written contract cannot be doubted. In the absence of this written contract by the Detroit Bankers Company stockholders to pay the assessment liability no charter would have been issued to the holding company, nor would persons have deposited money with the various affiliated banking institutions. It is well settled that it will be presumed that the public, in depositing money in a bank, does so in reliance upon the superadded liability of its stockholders. *Laurent v. Anderson* (C. C. A. 6 1934), 70 Fed. (2d) 819; *Benedict v. Anderson* (C. C. A. 6, 1934), 70 Fed. (2d) 227. Further, from the use of the money deposited in the various unit banks, earnings were derived which went to the stockholders of the Detroit Bankers Company by way of dividends. This is set forth in appellant's bill. Having received the benefits of her contract, appellee cannot now renounce its obligations.

The beneficiaries of this written contract were the depositors and creditors of First National Bank-Detroit, represented in this court by the appellant. His right to sue on this promise given for the benefit of these persons represented by him is sustained by a long line of authorities, many of which are cited and discussed on page 279 of Judge Hayes' opinion in *Barbour v. Thomas, supra.* Further, this issue was conclusively settled by the affirming of the lower court on this as well as the other points by the Circuit Court of Appeals for the Sixth Circuit (*Barbour v. Thomas,* 86 Fed. (2d) 963) and the denial of certiorari by the Supreme Court of the United States (*Barbour v. Thomas,* 300 U. S. 670) in what is, in reality, the very case at bar.

LACHES AND STATUTE OF LIMITATIONS

Among the further defenses discussed in appellee's brief is the plea of laches. As appellee admits, this is raised for the first time in her brief. It is certainly not compelling, even had it been seasonably raised.

The sole basis for the plea is the alleged difficulty appellee believes she will encounter in contesting appellant's assessment claim. It is not apparent on the face of the record that appellee has any defense whatsoever to the assessment claim. There is nothing disclosed which points to the position of appellee being any different from the position of the thousands of Detroit Bankers Company shareholders who have paid to the First National Bank-Detroit receiver, the majority without being forced to do so by direct suit, the approximately Eighteen Million Dollars that appellant has collected to date on this First National Bank-Detroit stock assessment.

Appellee was not misled in any way into believing that she would be accorded any immunity not extended to her fellow stockholders, nor treated in any different manner than the other Detroit Bankers Company stockholders. Nor would appellant be empowered to do so.

Appellee apparently resided in Detroit throughout the period of the *Barbour v. Thomas* litigation, and this litigation received the widest of publicity in that locality. There can be no foundation for any claim upon the part of appellee that she was not fully aware, at least following that litigation, of her obligation to pay her proportionate share of the First National Bank-Detroit assessment. Appellee apparently determined that she would not respond to this obligation until absolutely forced to do so. It appears that she determined to make the col-

lection of her obligation as difficult as possible. If it be her privilege to force appellant to go to the courts to collect on this clear obligation, she should not expect sympathy when appellant does take these steps to which he has been forced; steps which he is not only within his rights in taking, but which his duty to the depositors and other creditors of First National Bank-Detroit demand that he take. It is not the province of courts to encourage any reneging on clear obligations, nor has it been their attitude to encourage such. Rather the contrary is the case. Any difficulty appellee may have in presenting this "defense" of which she speaks is of her own making. The alleged change in her affairs, which she mentions, is not such a change as courts have found sufficient to support a plea of laches, even when seasonably raised.

In discussing the applicable California statute of limitations in the case at bar, the appellee rests her case largely upon the decisions in *King v. Armstrong* (1908), 9 Cal. App. 368, 99 Pac. 527, and *Johnson v. Green* (C. C. A. 9, 1937), 88 Fed. (2d) 638. These cases, and like decisions, have been amply distinguished by appellant in his opening brief (pages 50-51). These cases deal with the application of Section 359 of the California Code of Civil Procedure. Only the pure statutory cause of action comes within the purview of this section, and it will suffice to call again the attention of this Court to the fact that the case at bar involves an *express written contract cause of action independent of and apart from the cause of action based purely on the "liability created by law,"* the pure statutory cause of action. This contract cause of action pleaded by appellant is governed by Sections 337 and 351 of the California Code of Civil Procedure, and under the provisions thereof was not barred when the case at bar was commenced.

Appellee continues with the argument that in the case of "statutes that both prescribe the right and a limitation period, that upon the expiration of the limitation period the liability itself ceases to exist."

The fallacy of this argument lies in the fact that appellant's contractual right in the case at bar is not prescribed by any statute. The independent express contract obligation of appellee, here before this Court, *arises from and rests upon her voluntary assumption of the assessment obligation, and is an obligation the source of which is separate and apart from and independent of any statute.* Whether correct or not in a case to which it might be applicable, appellee's argument has no pertinency here since no right arising out of a statute which likewise prescribes the limitation period is before this Court.

This argument of appellee's is not pertinent, even were appellant before this Court with only a cause of action based upon the pure statutory assessment liability prescribed by the National Bank Act, and that alone. The National Bank Act prescribes no limitation period. However, since *a contract right independent of statute is here involved,* no further consideration of this is here called for.

It is a general and fundamental principle of law that a statute of limitations is but a bar to a remedy, not an instrumentality for the extinguishing of an obligation. The fact that the bar is a personal privilege which may be waived or become inoperative in a number of ways is illustrative of this. Citations to support this principle of law could be collected in great numbers, but the fallacy of appellee's argument is so apparent that to take up the time of the Court in this manner is neither necessary or justifiable.

SUPPLEMENTAL BILL

Appellant's position as to his right to have accepted for filing his supplemental bill proffered to the District Court is fully covered in his opening brief. *This supplemental bill introduces no new cause of action;* and, on the authorities and arguments in appellant's opening brief advanced, appellant reiterates his claim that the denial of his right to file the supplemental bill must have been based upon a misconception of the nature of the causes of action involved in the case at bar, and that *the denial constituted a clear abuse of discretion on the part of the lower court.*

METHOD OF TRIAL

In view of the abolishing of any distinction between cases in equity and actions at law in the Federal Courts, as concerns the method of filing, by the new Federal Rules of Civil Procedure, it seems beside the point to discuss the question as to the case at bar having been properly a suit in equity when filed.

However, to such extent as it may be deemed pertinent, it is sufficient to show that these First National Bank-Detroit assessment suits have been held to have been properly filed in equity under the former federal procedure.

Barbour v. Thomas (D. C. Mich. 1934), 7 Fed. Sup. 271; C. C. A. 6 (1936), 86 Fed. (2d) 510; cert. den. (1937), 300 U. S. 670, 81 L. Ed. 877;

Ullrich v. Thomas (C. C. A. 6, 1936), 86 Fed. (2d) 678; cert. den. (1937), 301 U. S. 692, 81 L. Ed. 1348.

See also: *Adams v. Johnson* (1883), 107 U. S. 251, 27 L. Ed. 386;

Metropolitan Holding Company v. Snyder (C. C. A. 8, 1935), 79 Fed. (2d) 263;
Corker v. Soper (C. C. A. 5, 1931), 53 Fed. (2d) 190.

CONCLUSION

Appellant again requests and urges that the judgment of the District Court "upon sustaining defendant's (appellee's) motion to dismiss and for judgment and denying plaintiff's (appellant's) motion for leave to file supplemental bill" be reversed by this Court and that this Court remand this case to the District Court for trial on its merits, together with instructions that leave be granted appellant to file his supplemental bill. Further, that appellant be granted his proper costs expended in taking this appeal.

Respectfully submitted,

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Attorney for Appellant, B. C. Schram, Receiver of First National Bank-Detroit.

ROBERT S. MARX,
Of Counsel.

APPENDIX

Schram v. Hail, U. S. Dist. Ct. Eastern Dist. of Michigan, So. Div., Civil Action No. 95

(Decided September 12, 1939).

In holding that the receiver of the bank was entitled to recover on a First National Bank-Detroit assessment claim against a husband and wife jointly on Detroit Bankers Company stock held by them jointly, notwithstanding the husband's discharge therefrom in bankruptcy, the court said in part (Frank A. Picard, U. S. District Judge:)

> "In Michigan beginning with *Edwards and Chamberlin Hardware Co. v. Pethick,* 250 Michigan 315, it was held that the husband's discharge in bankruptcy was *no bar to recovery of a joint judgment against husband and wife on an action on a note signed by both of them.* It refers to the nature of such a holding as being one of *'quasi in rem'.* Michigan's supreme court then follows that decision in *McPherson v. Gregory,* 217 Michigan 580 and in *Kolakowski v. Cyman,* 285 Michigan 590.
>
> The other questions presented by defendant bearing upon the wife's failure to sign any note or other instrument with her husband and upon whether ownership of Detroit Bankers Company being tantamount to ownership of First National Bank-Detroit are evidently all settled by *Barbour v. Thomas,* 86 Fed. (2d) 228, *First National Bank v. Sleeper,* 12 Fed. (2d) 288, and *Laurent v. Anderson,* 70 Fed. (2d) 819.
>
> It appears from these cases that it is not necessary that the wife sign any instrument with her husband in order to be bound with him on

a joint obligation; that *in addition to the statutory liability, defendants were obligated by the express written contract embodied in the articles of association of Detroit Bankers Company; that when they accepted the stock* (and in this instance the wife had to sign for the dividends) *that this is conclusive proof that the holders did contract to be bound by the terms, to-wit—pay any assessment properly due.* The *Barbour* case, *supra,* holding that owners of Detroit Bankers Company stock were owners of First National Bank-Detroit stock in proportion, is a landmark in Michigan and on that decision the receiver has collected millions for the depositors. It was the decision that ran the gauntlet of banking liabilities in Michigan, was bitterly contested by eminent counsel and after being upheld by the Court of Appeals, went to the Supreme Court. We cannot go beyond this case under any circumstances." (Italics ours.)

* * * * *

Schram v. MacPherson, U. S. District Ct. Southern Dist. of Florida, Jacksonville Div., Case No. 850-J in Equity

(Decided October 13, 1939)

In sustaining the motion of the receiver of the bank for a summary judgment against defendant for his First National Bank-Detroit assessment obligation by reason of his Detroit Bankers Company stock holding, the court said in part (Louie W. Strum, U. S. District Judge):

"Besides such statutory liability, *defendant by accepting the shares in the holding company, also assumed the super-added contractual liability* imposed to the same extent, by Article IX-A of the holding company's charter, printed on the stock certificates." (Italics ours.)